"As observed by Chief Justice Hughes, judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

*Appeal allowed.*

Solicitors: *Zaid Ibrahim & Co.; Karpal Singh & Co.*

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## TAN SIN MOH v. LEBEL LTD.

**[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) 14 October 1986 & 6 February 1988]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 159 of 1986]**

*Bankruptcy – Appeal against receiving and adjudication order – Failure to satisfy judgment debt – Act of bankruptcy – Allegation that judgment entered against debtor was wrong in law – Withdrawal from partnership – Notice of withdrawal from partnership not given specifically to habitual customer – Bankruptcy Act 1967, s. 3(1).*

*Partnership – Withdrawal from partnership – Particulars kept in Registry of Businesses – Notice of withdrawal not given specifically to habitual customer – Registration of Businesses Act 1956, s. 6 – Partnership Act 1961, s. 38(1).*

This was an appeal against a receiving and adjudication order. The petition against the debtor-appellant disclosed that a judgment debt obtained in a High Court civil suit had not been satisfied and the learned judge therefore ruled that an act of bankruptcy had been committed and consequently granted the order prayed for. The appellant alleged that the judgment entered against him was wrong in law because the claim of the petitioning creditor-respondent contained a material error in respect of the registered particulars in the Registry of Businesses. The appellant alleged that he had withdrawn from the partnership on February 1, 1976 but the withdrawal was wrongly registered as being on August 23, 1978.

The defence of the appellant in the civil suit had been struck out on the ground that it was frivolous, vexatious and an abuse of the process of the court. The respondent relied on section 38(1) of the Partnership Act to treat apparent members of the partnership firm as still being members until they had notice of the change and that no affidavit to the effect that the respondent had notice of the appellant's withdrawal was filed. The learned judge also relied on the proposition that a person who had habitual dealings with a partnership is entitled to be specifically notified of the withdrawal of the partners, a mere notice to the Registrar of Businesses being insufficient. An application for leave to appeal out of time in the civil suit was dismissed by the Supreme Court.

**Held**, dismissing the appeal: (1) the respondent was, on the evidence available, a person who had habitual dealings with the partnership and was therefore to be specifically notified of the withdrawal of the appellant from the partnership, something which the latter had omitted to do;

(2) the respondent creditor was therefore entitled under section 6 of the Registration of Businesses Act 1956 to rely on the particulars kept in the Business Registry to ascertain whether the appellant remained a partner of the firm at the commencement of the suit;

(3) the learned judge was correct in not finding evidence of fraud, collusion or miscarriage of justice and in refusing to apply his discretion to go behind the decision in the civil suit and enquire into the validity of the judgment debt.

*Cases referred to:*

(1) *Kam Hoy Trading* v. *Hup Aik Tin Mining Company* [1967] 2 M.L.J. 179 (refd).
(2) *Hup Aik Tin Mining Company* v. *Kam Hoy Trading* [1969] 1 M.L.J. 93 (folld).
(3) *Lye Thai Sang & Anor.* v. *Faber Merlin* [1986] 1 M.L.J. 166 (distd).
(4) *Re Flatau, ex parte Scotch Whisky Distillers Limited* [1888] 22 Q.B.D. 83 (refd).

SUPREME COURT.

*Oliver Phipps* (*Ooi Teik Hoe* with him) for the appellant.

*Mahinder Singh Dulku* for the respondent.

*Cur. Adv. Vult.*

**Wan Suleiman S.C.J.** (delivering the judgment of the court): This is an appeal against a receiving and adjudication order by the debtor. The petitioning creditor had in his petition before the High Court disclosed that a judgment debt of $62,220.77 together with interest obtained in Penang High Court Civil Suit No. 436 of 1980 had not been satisfied. The learned judge therefore ruled that an act of bankruptcy under section 3(1)(i) of the Bankruptcy Act had been committed, and consequently granted the order prayed for.

Since the grounds for opposing the petition itself in the court below are substantially the same as those raised in the appeal, it will be pertinent to set out the particulars in some detail. The appellant had alleged in the court below that the judgment entered against him in the aforementioned civil suit was wrong in law because the petitioning creditor's claim contained a "material error" which had influenced the judge (Edgar Joseph Jr. J.) to grant the application to strike out his defence and to enter judgment against him.

The "material error" it seems is in respect of the registered particulars in the Registry of Businesses. In the court below, counsel for the appellant alleged that the particulars relating to his client's withdrawal from the partnership was wrongly registered as being August 23, 1978 whereas the latter had done so on February 1, 1976. Acting on the incorrect particulars issued by the Registrar of Businesses under rule 14(b) of the Registration of Businesses Rules, counsel for appellant continued, the respondent judgment creditor had succeeded in getting the defence struck out and judgment entered against the appellant.

We should pause here to examine what took place at the hearing of the summons-in-chambers in Civil Suit No. 436 of 1980 wherein the order striking out his defence was made.

The application was under Order 18 rule 19(1) (b) & (d), it being alleged that the defence was "frivolous, vexatious and an abuse of the process of the court". It will be seen from the accompanying affidavits and the notes of proceedings (Vol. 1 Pt. C pg. 30/31) that the applicants therein were relying, as they are entitled to do, under section 38(1) of the Partnership Act to treat apparent members of the old firm as still being members until they have notice of the change (the notice of withdrawal of the appellant was not registered by the Registrar until August 23, 1978) and that no affidavit to the effect that respondent had notice of appellant's withdrawal had been filed.

It was also apparent from the judge's notes that the case of *Kam Hoy Trading* v. *Hup Aik Tin Mining Company*[1] was considered, a decision which was affirmed by the Federal Court in *Hup Aik Tin Mining Company* v. *Kam Hoy Trading*[2] which was cited before us by counsel for respondent as authority for the proposition that a person who has habitual dealings with a partnership is entitled to be specifically notified of the withdrawal of the partners, a mere notice to the Registrar of Businesses being insufficient.

There being no affidavit from the appellant alleging the giving of such notice, the respondent's application to have the defence struck out was then granted.

Being out of time to file an appeal, a state of affairs for which the appellant blamed his solicitors, he subsequently applied for leave to appeal out of time to the Supreme Court without success.

For the respondent, Mr. Dulku submits that though this appeal is against the decision of Mohd. Dzaiddin J., it is in effect an appeal against the decision of Edgar Joseph Jr. J. in respect of which appeal the extension of time to appeal was refused by the Supreme Court.

We are unable to be certain about the reason for the failure of the appellants to succeed in their application and would decline to apply the rule in *Lye Thai Sang & Anor.* v. *Faber Merlin*[3] (which Mr. Dulku submits should be applied) where this court ruled that having heard and disposed of a matter, this court has no power to review its own decision.

Mr. Phipps submits that the High Court which has powers under section 92 of the Bankruptcy Act to "review, rescind or vary any order made by it under its bankruptcy jurisdiction" was wrong in not doing so because of the "material error" mentioned earlier. In addition, he had in the court below relied on *In Re Flatau, ex parte Scotch Whisky Distillers Limited*[4] as authority for the proposition that the trial judge (Mohd. Dzaiddin J.) could go behind the decision of Edgar Joseph Jr. J. in C.S. 436 of 1980 and enquire into the validity of the judgment debt.

The respondent was, on the evidence available, a person who had habitual dealings with the partnership and was therefore to be specifically notified of the withdrawal of the appellant from the partnership, something which the latter had omitted to do. (See *Hup Aik Tin Mining Company* v. *Kam Hoy Trading.*[2]) The respondent creditor was therefore entitled under section 6 of the Registration of Businesses Act 1956 to rely on the particulars recorded in the register kept in the Business Registry to ascertain whether the appellant remained a partner of the firm at the commencement of the suit.

The learned judge was, with respect, correct in not finding any evidence of fraud, collusion or miscarriage of justice, and indeed in declining to apply his discretion on the principle enunciated in *In Re Flatau*[4].

Accordingly, we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

*Appeal dismissed.*

Solicitors: *Ooi Lee & Co.; Mahinder Singh Dulku & Co.*